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tracted with reference to the charter capitalization, not to the amount actually subscribed for at the time of their contract.¹ In other words, no court would attempt to gauge the liability of each stockholder separately by the exact time when he took his stock, with reference to the dates when the several claims of creditors accrued; even the flexibility of a court of equity would not admit of this. With this reasonable qualification, the rule of non-liability of stockholders for antecedent debts of the corporation may be considered established as part of the trust-fund doctrine.

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WHAT IS ORDINARY CARE IN THE USE OF HIGH
EXPLOSIVES ?

(*Bertha Zinc Co. v. Martin*, 93 Va. 791.)

The principle of law announced by the Court of Appeals in response to the above question is of more than local interest. Let us note the facts as they appeared in the case.

Samuel Martin was an employee of the Bertha Zinc Company, engaged in the mining of zinc ores. The workmen were engaged on the morning of the accident in what is termed surface mining, carried on by digging a cut into the hill and blasting down blocks of ore and earth from the head of the cut. For the purpose of this blasting, dynamite was used. The morning of the accident was a cold, crisp morning in November, and it became necessary for the workmen to leave their work occasionally and go to a fire, which had been built against an old stump in the open for the purpose, to warm themselves. At the time Martin went to the fire to warm he had just finished drilling a hole in the bank for the purpose of putting in a charge of dynamite. Carico, another workman, was engaged at this time in thawing out sticks of dynamite by this open fire to prepare them for use in blasting, having some of the sticks standing with one end resting on the ground near the fire and holding one stick in his hands before the fire. While so engaged, and while Martin was standing by the fire, the explosion occurred, just how, the parties were unable to say. Carico had both his hands torn off, and was otherwise injured; Martin re-

¹ 2 Morawetz, *Priv. Corp.*, secs. 781, 828.

ceived a shock and injuries from which he died within a few hours; and others standing near were more or less injured. Martin's administrator brought his action for damages under the statute.

The evidence in the case showed that both Martin and Carico were ignorant of the use of dynamite.

Upon the trial of the case various questions arose which will not be considered in this article. The only question to be noticed will be that of the propriety of thawing dynamite by an open fire, and the evidence in the case bearing on this point.

On the part of the plaintiff it was contended that to thaw dynamite by an open fire was highly dangerous; that this danger was known to, or should have been known to, the defendant; and that practically safe and inexpensive methods of thawing were in use at the time, recommended by scientists and by the manufacturers of the article, which methods could and should have been used, and that the defendant was negligent in not providing the safest practical method in use at the time of the accident.

In support of this contention, the plaintiff introduced the testimony of several eminent scientists and experts in the use of high explosives, who concurred in saying that dynamite would explode from heat; that in a partially frozen state the danger of explosion from heat was greater than when thawed; that to thaw by an open fire was very dangerous for various reasons given, and that there were comparatively inexpensive methods and appliances used for thawing which reduced the danger to a minimum, and that these appliances were known to and recommended by manufacturers of the article, and could easily have been obtained. Plaintiff introduced, also, several practical experts, who testified from experience and observation, that dynamite would explode from heat; that it was dangerous to thaw by an open fire; and that other methods, safer and inexpensive, could have been used, and had, in fact, been used by them in their operations.

On the part of the defendant it was contended that dynamite would not explode from heat alone; that it was not dangerous to thaw by an open fire; and that the method of thawing by an open fire was the one in common use among employers engaged in the same operations as the defendant, or similar operations. Numerous witnesses—the practical experts—were introduced in support of this contention. These were, for the most part, men who were, or had been, engaged in railroad building and mining. The effect of their testimony was, that they had thawed dynamite by an open fire; that they had never known it to ex-

plode from heat, and did not believe it would so explode; and that they regarded that method of thawing safe. I take it that the jury found, and the appellate court must have found from the evidence, according to well-established rules, that it was dangerous to thaw dynamite by an open fire, and that a safer method might have been provided.

Upon this state of facts the Court of Appeals has given a definition of what constitutes ordinary care, as follows:

"The degree of care required in such cases, under our law, must be ascertained by the general usages of the business. The reason for such a rule is clearly and forcibly stated in the case of *Titus v. Railroad Co.*, 136 Penn. St. 618, 626. In that case it was said: 'All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in the employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall, in effect, dictate the customs or control the business of the community.' " Citing also *Bern v. Coal Co.*¹

With all deference to the high authority from which this declaration proceeds, it is submitted that it is open to criticism on established principles of law.

1. It eliminates altogether from the case the question whether the method of thawing the dynamite was dangerous, and whether that danger could have been avoided by a method known, or which could have been known, to the defendant by the use of ordinary diligence, and in use at the time, and one which could have been substituted without incurring great cost, and makes the question of negligence depend solely upon the *usages of employers*.

2. It takes away from the court and the jury the prerogative of saying whether the act complained of is negligent, and submits the question to employers engaged in like occupations.

¹ 27 W. Va. 285, 301.

3. It either assumes the character, or calls for an inquiry into the character, of the witnesses who testify in the case, or of the persons whose acts are vouched in support of that of the defendant charged with negligence.

Now, who is a man of 'ordinary care and prudence'? Is not he an ideal presumed to be known of all men, and by whom all men are to be measured in law? Is not the question of ordinary care and prudence for the jury to determine in the abstract, from the evidence before them, and not by proof of the character of individuals engaged in a particular business or occupation—the only limit to the degree of care required being that it shall not be such as to impose an unnecessary burden on the business or be prohibitive of its prosecution?

Must the defendant bring witnesses to prove the character of A, B, C and D, who use like methods with himself, for care and prudence? Is the plaintiff, on the other hand, put to the necessity of going to the country to prove that A, B, C and D are not men of ordinary care and prudence, and that they are not regardful of the lives of their employees?

When can an employer be convicted of negligence if he can excuse himself by merely proving the same acts with which he is charged, on the part of other employers—if he has merely to "measure himself by himself?"

The case of *Titus v. Railroad Co.*¹ relied upon, was that of a brakeman injured in the use of a standard gauge car over a narrow gauge track. Here, the danger, if such there were, was open and obvious to the employee. He had been engaged in the work of running these cars in this manner for several months and knew all about the employment and its risks. Besides this, there was no proof in the case to show that the manner of transferring standard gauge cars to and running them over a narrow gauge track was dangerous. The court in its opinion goes further than was necessary for the decision of the case, to lay down the proposition quoted in the opinion in the case under discussion, saying what would have been the effect if the proof had shown the method in use by the defendant to have been dangerous.

The case of *Bern v. Coal Co.*,² cited by the court, was the case of an employee injured by the explosion of fire-damp in a coal mine. The explosion was caused directly by the negligence of a fellow-servant. Here, also, the servant knew of the danger. The court does not in this case make the usage of the business the measure of ordi-

¹ 136 Penn. St. 618, 626.

² 27 W. Va. 285, 301.

nary care. In fact it seems to me that the case would very well support the negative of the proposition. The court says, at p. 301:

"The owner of a coal mine is not required to resort to the *most expensive methods* [italics mine] for keeping his mines freed from fire-damp in order to escape injury to his servants working in the mines caused by the explosion of the fire-damp. If he has reasonably safe methods in use for the proper ventilation of the mine, and uses reasonable care to keep the mine properly ventilated and the fire-damp expelled therefrom, he will not be responsible."

And the court gives the reason of the rule laid down to be that any other rule would be disastrous to the business, and would create a monopoly, as none but heavy capitalists could procure the necessary machinery, etc. The court says in the same opinion, at p. 300:

"Diligence and ordinary care are relative terms; what constitutes ordinary care depends upon the circumstances of each particular case. It is such care as a person of ordinary prudence would exercise under the circumstances."

Now, who shall say what that care is? Is it for the jury to determine under all the facts and circumstances of the case, or must they be instructed, as a matter of law, that ordinary care is to be determined absolutely by the usages of the business?

Perhaps the jury cannot be permitted to set a standard which shall dictate the customs or control the business of a community. Is it more reasonable to say that employers shall set a standard which shall under all circumstances bind a jury?

It is manifest that a railroad company could not be required to adopt every new appliance for the safety of the servant without regard to the cost or inconvenience attendant upon the making of the change. And so with all other employments. If so, the rule might result in prohibiting all business. But suppose the choice is to rest between an appliance or method accompanied by extreme danger—and latent danger at that—and one of comparative safety with very slight additional cost and inconvenience, can it be said that the usages of the business must determine in favor of the former?

In the case of *Norfolk, &c. Railroad Co. v. Ormsby*¹ the court, in considering the question whether the injury proceeded from any fault or neglect on the part of the defendant, puts the question: "Could the injury have been avoided by the use of any reasonable means which might and ought to have been used by the defendant?" and answers that it could. And goes on to say that in running cars propelled by steam, along a railroad over the streets of a populous city,

¹ 27 Grat. 445.

where there are a great many children, the greatest care and precaution are necessary and ought to be used to avoid danger to human life.

The court here did not make the character of employers engaged in like occupations and the usages of the business the test of negligence, but reserved to itself the prerogative of saying whether the act complained of was negligent. And it is submitted that that has been the course of the decisions in Virginia from the time of that case to the present.

The various rules regulating the duty of employer to employee are founded upon a principle of humanity. It is the principle that no one shall unnecessarily cause injury to another. It requires those who would expose others to danger in the prosecution of their business to adopt such methods of performing their work as will avoid as far as possible and practicable the dangers attendant upon the employment. The rules of law, correctly applied, require this of the employer under all circumstances. It is the duty of the court to weigh the act complained of; to try the one charged with negligence by the scale of ordinary care and prudence, and to determine whether he measures up to the standard of the law. He should not be measured merely by the standard adopted by men engaged in similar work.

Neither can it be said that because the employer did not know of the danger and the means of avoiding it, he should for that reason be excused. His want of knowledge in this respect may of itself constitute negligence. The question is, was the nature of the work, or of the instrument used, such as would put a reasonably cautious and prudent man on his guard, and upon inquiry as to the dangers attendant thereupon? If dangerous, could he have informed himself of the danger by the exercise of ordinary care and prudence? And, then, could that danger have been avoided by the use of methods known, or which could have been known by the exercise of ordinary care and prudence, and not of such a nature as to make their use unnecessarily burdensome or prohibitive?

It may be further stated that ordinary care and prudence are relative terms and depend upon the nature of each particular case. Their degree varies as the danger varies. Ought not more inquiry, more caution, to be required where the material used is the product of chemical science, whose composition and properties are known to the few, than where the danger attendant upon a particular work is open and obvious? And when the courts surrender the determination of this question to the arbiter of 'the usages of the business or employ-

ment,' where shall the ignorant employee look for protection? Is not this one of the most valued provinces of the court itself?

Precedents, so far as applicable, ought in all cases to be respected, but, where there is a conflict, should not that rule be adopted which is most conformable to the dictates of humanity? An employer can acquire by precedent no vested right to expose his servant to dangers of which he could and ought to know, and could without unreasonable expense avoid.

It would not be necessary for an employer to warn an employee of sane mind that it is dangerous to stand over a charge of giant powder with a lighted fuse attached. Here the danger is known to all. Can the same rule apply where the employee is placed in a position which may be equally as dangerous when the danger is unknown to him, and is or ought to be known to the employer?

It is not proposed to incorporate in this article the rule as laid down by the Supreme Court of the United States on this point.¹ This is fully set out in the able note to the case under discussion by the late and lamented editor of the REGISTER.²

It is submitted, however, that that rule is founded in reason and humanity, and is the one which ought to commend itself to the courts.

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GARNISHMENT OF A NON-RESIDENT GARNISHEE.

In 3 Va. Law Register, 235, I ventured the assertion that there was no provision made by any statute in Virginia for a garnishment proceeding against a non-resident garnishee.

Two replies to this communication were published in 3 Va. Law Register, 320-322; one by Hunsdon Cary, Esq., of Richmond, and the other by J. Geo. Hiden, Esq., of Culpeper. The reasoning and suggestions in these articles were far from satisfactory to me, but I made no attempt to answer the same at that time, hoping that other members of the profession would find a discussion of the question profitable. This would seem to be a most important question, and one which would frequently arise in practice, especially in those cities and

¹ *Wabash Railway v. McDaniels*, 107 U. S. 460, 461.

² 3 Va. Law Reg. 852.